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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term 1941

No. 1151

BERNADINE WARREN, administratrix ad prosequendum of the Estate of Harry Edward Warren, deceased,

Plaintiff-Appellant,

against

RICHARD E. HAINES, trading as Annandale Creamery Co.,

Defendant-Respondent.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD J. MACKEY,
Attorney for Petitioner.

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As yet there is no official report of the opinion of the Circuit Court of Appeals, Third Circuit in this case (R., pp. 47-50). No opinion was rendered in the Trial Court.

Supreme Court of the United States

In the Matter of the Petition of BERNADINE WARREN, for a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit to bring before the Supreme Court the case of BERNADINE WARREN, administratrix ad prosequendum of the Estate of Harry Edward Warren, deceased, *Plaintiff-Appellant,* against RICHARD E. HAINES, trading as Annandale Creamery Co., *Defendant-Respondent.*	Petition

To the

Honorable Justices of the Supreme Court of the United States of America:

The petition of Bernadine Warren respectfully alleges:

Your petitioner, at the time of the commencement of these proceedings, was and now is a resident of the State of New York, and the respondent is a resident of the State of New Jersey.

This action was brought in the United States District Court for the District of New Jersey to recover damages under the Death Act of New Jersey for the wrongful death of petitioner's husband, Harry Edward Warren, who was killed while riding in a Pontiac automobile which was struck by a milk truck owned and operated by the defendant.

The deceased was a man 34 years of age and his wife, Bernadine Warren, was 30 years of age at the time of his

death. Two children survived—Anita Louise, not quite three years of age, and Roland Edward, eleven months of age.

At the close of the trial in the United States District Court of New Jersey judgment was entered dismissing the action and an appeal was taken from that judgment to the Circuit Court of Appeals for the Third Circuit (R., p. 48). The judgment was affirmed and a petition for rehearing was filed by the plaintiff in that court (R., pp. 50, 51-59). The petition for rehearing was considered and denied on February 10, 1942 (R., p. 61).

Both the District Court and the Circuit Court of Appeals for the Third Circuit usurped the function of a jury in this case and refused to permit the questions of whether the defendant's negligence was the proximate cause of death, and whether the plaintiff's intestate was guilty of contributory negligence to be passed upon by the jury (R., pp. 47-50).

Such action on the part of the court violated the right of the plaintiff under many decisions of the Court of Errors and Appeals of the State of New Jersey, which hold that in a case such as the present the issue of proximate cause and contributory negligence is one for the jury. The rulings of the courts below in refusing to follow the determination of the highest court of the State of New Jersey in this regard flaunts the law as laid down by this court in the case of *Erie RR. Co.* v. *Tompkins,* 304 U. S. 64.

In the opinion of the Circuit Court of Appeals in this case it is ruled that the questions are whether, where a non-suit is granted "the plaintiff's evidence and all reasonable inference which might be drawn therefrom could have supported a finding that the driver of the truck was negligent, and if he was negligent, whether that neligence was the proximate cause of the accident" (R., p. 48).

The collision between the Pontiac car of the plaintiff's husband and the milk truck of the defendant occurred in the morning of August 18, 1939, between 6:30 and 7:00 o'clock (R., p. 48). The Pontiac car was traveling up hill in a westerly direction and the milk truck with a load of 24 tons was coming down hill in an easterly direction on State Highway No. 28 near the Town of North Branch in the State of New Jersey. The accident took place on the straightaway. At the place of the accident the concrete pavement of the road is twenty feet wide and was divided by a white center line into two ten foot sections. The milk truck was 8 feet wide (R., p. 48).

Mr. Hendershot, a witness for the plaintiff, testified that a few seconds before the collision the truck was two feet in from the edge of the road; asked to give a physical demonstration of the distance he indicated somewhat more than three feet. Assuming the physical demonstration to represent the actual distance, the left wheels of the truck must have been approximately one foot over the white center line (R., pp. 48, 16).

This witness resided directly behind the "Friendly Inn" shown at the scene of the accident depicted in Exhibit P1 (p. 15) and had just come there from his home immediately before the crash (R., pp. 13, 14, 15, 16).

The law of the road requires drivers to keep to the right of the center line and the New Jersey statute is in conformity with this rule. The truck was traveling at a speed between 40 and 45 miles an hour; the permissible statutory speed was 20 miles an hour (R., p. 16). Referring to these facts the Circuit Court of Appeals said:

> "In our consideration of the case we have not only accepted the testimony that the truck was three feet from the edge of the road and thus partially over the center line, but have also accepted as a reasonable inference therefrom that there was no

change in its position relative to the center line within the few seconds which elapsed from the time the witness first saw the truck until the collision.

Violations of traffic statutes may be considered by the jury in determining whether the defendant was negligent. Proof of the defendant's negligence is not sufficient, however, to justify a verdict for the plaintiff. There must be evidence that the defendant's negligence was the determinative or proximate cause of the injury. Such a finding in the present case would be based wholly upon speculation or caprice. According to the plaintiff's evidence, her deceased husband had all but one foot of his own ten feet wide section of paved road upon which to operate his Pontiac. There is nothing to show that his vision was obstructed or that his side of the road was crowded by other vehicles. There is no evidence that the defendant's truck cut into the path of the Pontiac'' (R., pp. 49-50).

The last few lines of the above quoted opinion show where the court has usurped the functions of the jury.

As a matter of fact the Circuit Court, in rendering that opinion, cites the case of *Podolsky* v. *Sautter,* 102 N. J. L. 598; 133 A. 199 (R., p. 49).

That cited case demonstrates that the court was in error in so usurping the jury's functions because it is a case where a driver ran into a truck which was parked on the highway without any lights. The parked truck was violating the Motor Vehicle Act by failing to exhibit a rear light, and the defendant in that case contended that a verdict should have been directed because his negligence was not the proximate cause of the accident, since the plaintiff's driver admitted that he first saw the truck at a distance of 25 feet away and could stop his car within around six feet at the speed at which he was proceeding. The court there said:

> "But we think this argument is fallacious. Before the judge can take away from the jury the question whether or not the negligence of the defendant is the proximate cause of the injury and determine that question himself, the facts must, not only be undisputed, but the inferences to be drawn from those facts must be such that fair minded men ought not to differ about them. * * *
>
> We think that the mere fact that the driver of the car in which the plaintiffs were riding testified, on cross examination, that he could stop his car within around six feet when going 20 miles an hour, did not render the proximate cause of the accident a question of law for the court, but rather that such question was one of fact for the jury."

In the case at bar, amplifying the facts as recited in the opinion of the Circuit Court of Appeals for the Third Circuit, attention must be called to the physical condition of the automobile of the plaintiff's intestate after the accident when his car was stopped over to the right side of the road in the direction in which he was proceeding (R., pp. 21, 20).

A photograph, marked Exhibit P-3, shows how the whole left side of his car was sheared off, including the running board and the left fender (R., p. 20). The policeman, who came up after the accident, said that the left side was completely torn out of the car; the front end was barely damaged (R., p. 23). The left front fender and left running board of the Pontiac were still on the left front fender of the tractor of the truck (R., p. 24). The tire was off the wheel of the defendant's truck and the whole left front was badly damaged (R., pp. 24, 25).

A photograph of the truck appears in evidence as Exhibit D-5, and this photograph shows that the entire front wheel and axle are off the truck and are being held on the side of the truck when the picture was taken by a chain

wrapped around the axle to hold the wheel in this position (R., p. 22).

There is no evidence whatever in the record to justify the assertion that the plaintiff's deceased husband had all but one foot of his own ten feet wide section of the paved road upon which to operate his Pontiac and that he saw the defendant's truck over the center line within a few seconds which elapsed before the collision.

A few seconds after plaintiff's witness saw the defendants truck partially over the centre line he heard the crash (R., p. 16). When the smash-up happened he saw the Pontiac fly off from the truck to the right side of road (R., p. 18). When the accident happened the Pontiac was away from the center (R., p. 18).

There is no question that the collision was the cause of the death and everything in the case points to the necessity of submitting the issues to the jury and to the error of the courts in dismissing the action without permitting the issues to be passed upon by the jury.

The defendant's negligence is shown as a cause of the collision when it appears that the plaintiff's intestate was on his own side of the center when defendant's truck collided with him (R., p. 18). This is enough to permit a jury to infer that the collision resulted from the wrongful act of defendant in placing his truck on that part of the highway upon which he was forbidden to go.

If a pedestrian on the sidewalk was struck by a truck mounting the curb the negligence of the truck driver would obviously be the proximate cause of the collision. The court would not be heard to say that the pedestrian had nine feet of the sidewalk left to walk on and his view was unobstructed and the truck only mounted the curb to the extent of one foot. The same reasoning applies here.

Reasons for Allowance of the Writ.

Your petitioner respectfully alleges that the present case is one in which it is proper for this court to issue a writ of certiorari for the following special and important reasons:

(a) The Circuit Court of Appeals for the Third Circuit has decided an important question of local law in a way probably in conflict with the applicable local decisions, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(b) The Circuit Court of Appeals has decided an important question of general law probably untenable or in conflict with the weight of authority.

(c) That the United States Circuit Court of Appeals for the Third Circuit, has violated the rule laid down by this court in *Erie RR. Co.* v. *Tompkins,* 304 U. S. 64, in that it has affirmed the ruling of the court below withdrawing from consideration of a jury in a death case the issues of whether the proven negligence of the defendant was the proximate cause of the death, and whether or not the plaintiff's intestate was guilty of contributory negligence, despite the fact that numerous decisions of the Court of Errors and Appeals of the State of New Jersey in similar cases, where the evidence was not as strong as presented here, has ruled that these questions are for the jury.

The various decisions of the State court referred to here will be specified in the brief accompanying this petition. The court has granted certiorari heretofore where it appears that a short statement of

the dominant facts as they might have been found was sufficient to show that the plaintiff had a right to go to the jury.

Simmons v. *Swan*, 275 U. S. 113

and where the correctness of a charge in relation to contributory negligence and proximate cause was involved.

Kansas City So. Railway v. *Ellzey*, 275 U. S. 236.

(c) Because of the importance to plaintiffs in numerous actions for wrongful death of a ruling that where the facts are similar to those in the case at Bar, they are entitled to go to the jury on the question involved and should not have their rights determined by the court.

WHEREFORE your petitioner respectfully prays that this Honorable Court will grant a writ of certiorari in this case to the Circuit Court of Appeals for the Third Circuit, requiring the said United States Circuit Court of Appeals for the Third Circuit to certify the record in this case to this court for its consideration, and that thereon the court will decide the matter in controversy in favor of your petitioner herein, and your petitioner will ever pray.

BERNADINE WARREN,
Petitioner,

By RICHARD J. MACKEY,
Attorney.

RICHARD J. MACKEY,
Attorney for Petitioner.

State of New York, }
County of New York, } ss.:

I, RICHARD J. MACKEY, being duly sworn, say: That I am the attorney for the petitioner herein named, and am familiar with the facts in this matter. I have read and know the contents of the foregoing petition and that the same is true of my own knowledge.

That this petition is made in good faith and not for the purpose of delay.

RICHARD J. MACKEY.

Sworn to before me this
15 day of April, 1942.

ADELE M. O'KEEFE,
Notary Public,
Kings County.
Kings Co. Clerk's No. 106, Register's No. 3017.
Certificate filed in New York Co.
New York Co. Clerk's No. 45, Reg. No. 3-O-20.
Commission expires March 30, 1943.

I HEREBY CERTIFY that I am a member of the Bar of the Supreme Court of the United States, and that I have examined the foregoing petition for a writ of certiorari and that in my opinion the said petition is well founded in law and that the said writ should be issued by this court.

RICHARD J. MACKEY.